

BEFORE THE POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

ALLIED AQUATICS,)	
)	
Appellant,)	PCHB NO. 91-40
)	
v.)	
)	FINAL FINDINGS OF FACT,
STATE OF WASHINGTON, DEPARTMENT)	CONCLUSIONS OF LAW
OF ECOLOGY,)	AND ORDER.
)	
Respondent.)	

This matter came on for hearing before the Pollution Control Hearings Board on Friday, January 15, 1993, in the Board's offices in Lacey, Washington. In attendance were Board chairman Harold S. Zimmerman and Attorney Member Robert Jensen with Administrative Appeals Judge John H. Buckwalter presiding. Proceedings were recorded by Randi H. Hamilton, Certified Shorthand Reporter, of Gene Barker & Associates of Olympia, Washington, and were also taped.

At issue was an eighteen thousand dollar (\$18,000) civil penalty imposed by the Department of Ecology (hereinafter "Ecology") on Allied Aquatics (hereinafter "Aquatics") for allegedly treating Ohop Lake with certain chemicals without proper posting.

Appearances were:

Don Taylor, Attorney, for Aquatics.

Kerry O'Hara, Assistant Attorney General, for Ecology.

Witnesses were sworn and testified, exhibits were examined and admitted, and closing arguments of counsel were filed with the Board on or before January 29, 1993. From these, the Board makes these

FINAL FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER
SHB NO. 91-40

1 FINDINGS OF FACT

2 I

3 Aquatics is a corporation of which Doug Dorling is the president
4 and sole owner and stockholder. Since 1980 (and for four prior years
5 under the name of A-1 Spray Service) Aquatics has been involved with
6 the management of lakes for aquatic weed and algae problems.

7 II

8 On March 21, 1990, Ecology, as authorized by 90.48 RCW and WAC
9 173-201-035(8)(e), issued General Order DE 90-115 to Aquatics. This
10 Order specified that:

11 Any application of herbicides to waters of the State shall
12 comply with the conditions listed in both this General
13 Administrative Order (which applies to all waters within the
14 State) and the Specific Administrative Order(s) issued under a
15 separate cover) for the individual waterbodies to be treated.

16 III

17 On May 8, 1990, after considering comments offered by Aquatics on
18 the above General Order, Ecology issued an Amendment to the Order, No.
19 135. The Amendment specified that:

20 Any application of herbicides to waters of the State shall
21 comply with the conditions listed in these Amendments which
22 supersede corresponding conditions under General Administrative
23 Order DE 90-115. The applicator shall adhere to all other
24 conditions in (the General Order) ...

25 IV

26 On June 11th, 1990, Aquatics posted Ohop Lake with warning signs
27 and treated it with the herbicide Aquathol K. On June 27, 1990,

28 FINAL FINDINGS OF FACT,
29 CONCLUSIONS OF LAW AND ORDER
30 SHB NO. 91-40

1 Aquatics again treated Ohop with three compounds, Aquathol K, Sonar,
2 and copper sulphate. Warning signs were posted in the same areas as
3 for the June 11th treatment.

4 V

5 Aquathol (manufacturer's name) is a herbicide whose active
6 ingredient is endothall. The controls for endothall products found in
7 Ecology's General Order No. 90-115 were based on health risk studies
8 performed in 1986 and 1988, subsequently summarized in an Ecology
9 Human Health Risk Assessment which was in preparation at the time of
10 issuance of the General Order and which was published in 1991.

11 Health risks are further indicated by the manufacturer's own
12 Aquathol label indicating the treatments necessary if the product gets
13 into the eye, is swallowed, or contacts the skin, along with a further
14 precautionary note to physicians.

15 VI

16 On July 8, 1990, Aquatics posted some properties around the Lake
17 and, on July 9, 1990, again treated portions of the lake with Aquathol
18 K and copper sulphate. Aquatics did not place any buoys with warning
19 signs in the lake at any location.

20 VII

21 Christopher Maynard is an Environmentalist with the Water Quality
22 section of Ecology and is responsible, among other duties, for civil
23 enforcement of Ecology water quality orders. On the day of treatment,
24 July 9, Maynard made observations for approximately two hours from a
25

row boat on Ohop including videotaping many of his observations. He observed, and taped, instances of properties without any warning signs, warning signs which could not be read because of being folded over, properties where signs faced lakeward or landward but not both, signs from the June treatments which were still posted, and he observed that there were no buoys with warning signs on the lake. He also observed a person who was fishing in the lake, a water skier, and two persons who intended to go swimming in the lake until he warned them of the chemical treatment being performed.

VIII

On October 23, 1990, Maynard submitted to Ecology a Recommendation for Enforcement based on the alleged failure of Aquatics to post warning buoys on the lake, and Ecology issued Notice of Violation No. DE 90-184 to Aquatics for that alleged deficiency. On November 1, 1990, Maynard recommended further enforcement action, and Ecology issued notice of Violation No. DE 90-185 to Aquatics, citing violations of the General Order regarding posting of warning signs on private property. On January 16, 1991, Ecology issued Order and Notice of Penalty Incurred No. DE 90-228, assessing an \$18,000 penalty for the alleged violations. Aquatics appealed to this Board in a timely manner.

IX

Any Conclusion of Law deemed to be a Finding of Fact is hereby adopted as such. From these Findings of Fact the Board makes these

FINAL FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER
SHB NO. 91-40

1 CONCLUSIONS OF LAW

2 I

3 This Board has jurisdiction over the parties and the subject
4 matter of this action. RCW's 90.48.144, 43.21B.300. Because this is
5 an appeal from a civil penalty, the party which imposed the penalty,
6 Ecology, has the burden of proof.

7 II

8 At issue are whether Aquatics violated the notice provisions of
9 paragraphs P-2, P-3(1), and P-3(3) of General Order No. DE 90-115 and,
10 if so, whether the \$18,000 penalty is justified. These will be
11 discussed individually below.

12 ALLEGED VIOLATIONS OF PAR. P-2

13 III

14 P-2 specifies in part that "The applicator shall remove all signs
15 within 48 hours following the end of the period of water use
16 restrictions ..."

17 IV

18 Maynard's un rebutted evidence clearly shows that he saw some
19 warning signs which had been placed around the lake by Aquatics for
20 the earlier June 11 treatment, that three waiting periods were
21 designated on them (24 hours of no swimming, 3 days of no fishing, and
22 14 days of no use of water for domestic irrigation or agricultural
23 purposes), and that they carried a designated removal date of June 27,
24 1990. As observed by Maynard on July 9, 1990, these July 11th signs
25

26 FINAL FINDINGS OF FACT,
27 CONCLUSIONS OF LAW AND ORDER
SHB NO. 91-40

1 had not been removed by Aquatics after expiration of the longest (14
2 days) "no use" period and on or before the June 27 removal date.

3 V

4 We conclude that Aquatics did not "remove all signs within 48
5 hours following the end of the period of water use restrictions" and
6 did violate Paragraph P-2 as alleged.

7 ALLEGED VIOLATIONS OF PAR. P-3(1)

8 VI

9 P-3(1) specifies various requirements for posting private
10 property areas. These requirements and the alleged violations will be
11 discussed individually below.

12 VII

13 *Signs shall be ... made of durable weather-resistant material.*

14 There was testimony that some signs were not sturdy enough to
15 withstand the effect of bad weather. Maynard used the term "wimpy" to
16 describe them. We conclude that the term "wimpy" is subjective and
17 does not reach the burden of proof required to show that the signs
18 were not made of "durable weather-resistant material".

19 VIII

20 *Signs must be readable from both sides ...*

21 This requirement could have been met by posting two signs, one
22 facing lakeward and other landward, or by one sign printed and
23 readable on both sides.

24 The un rebutted evidence was that, in some cases, there was only
25

1 one one-faced sign on a property which faced lakeward only or landward
2 only, and, in some cases, a lakeward facing sign was fastened to a
3 permanent object which would not allow it to be read from the shore.
4 We conclude that Ecology met its burden of proof, that some signs were
5 not readable from both directions, and that there were violations of
6 this requirement.

7 IX

8 *Signs must ... be placed within 10 feet of the shoreline*
9 *adjacent to the treatment area(s).*

10 We conclude that Ecology met its burden of proof, that some signs
11 were not posted within the 10 foot limit, and that there were
12 violations of this requirement.

13 X

14 *When using endothall compounds, the applicator shall extend the*
15 *zone of shoreline posting to include all property lots within 400 feet*
16 *of the treatment area(s).*

17 We conclude that there were numerous properties within 400 feet
18 on which no signs were posted, that Ecology met its burden of proof,
19 and that there were violations of this requirement.

20 XI

21 In summary, we conclude that there were numerous violations of
22 Par.P-3(1) sign requirements on Lake Ohop on July 9, 1990.

23 ALLEGED VIOLATIONS OF PAR. P-3(3)

24 XII

25 Par. P-3(3) establishes various requirements for posting warning

26 FINAL FINDINGS OF FACT,
27 CONCLUSIONS OF LAW AND ORDER
SHB NO. 91-40

1 signs on buoys in the lake itself. The P-3(3) requirements which are
2 pertinent to this appeal are discussed below.

3 XIII

4 When endothall compounds are used, the applicator shall place
5 buoys so they form a 400 foot buffer strip around the treatment area.

6 The un rebutted evidence shows that Aquatics placed no buoys in
7 the lake.

8 XIV

9 When the entire water body is to be treated in one application,
10 buoys need not be posted.

11 Aquatics own application maps show that the entire lake was not
12 treated, therefore, the placement and posting of buoys was not excused.

13 XV

14 Par. P-4 of the General Order states in full:

15 When combinations of herbicides are used, the
16 applicator shall adhere to the posting and notification
17 requirements for the herbicide with the most extensive or
18 stringent requirements. (For example, if endothall, glyphosate,
19 and copper sulfate are used together, signs and notices shall at
least list all three herbicides, include the water use
restrictions required for endothall, and adhere to the 1/2 mile
residential notification requirement for glyphosate) (emphasis
added).

20 In the July 9, 1990, of the herbicides applied, the endothall
21 product, Aquathol, had the "most extensive and stringent
22 requirements", which included the requirement for placement and
23 posting of buoys in the lake.

24 We conclude that Ecology met its burden of proof, that Aquatics
25

1 did not place and post buoys as required, and that there was a
2 violation of Par. P-3(3).

3 XVI

4 In summary, we conclude that Ecology has met its burden of proof
5 and that there were violations of Paragraphs P-2, P-3(1), and P-3(3)
6 requirements on July 9, 1990 when Aquatics treated Lake Ohop with
7 Aquathol.

8 LIABILITY

9 XVII

10 Aquatics suggests that it should not be held liable for the
11 penalty imposed by Ecology because (according to Dorling's
12 uncorroborated testimony) some of the residents around the lake
13 refused to allow him to post warning signs and/or tore down signs
14 which he had posted on July 9, the day before treatment.

15 XVIII

16 Paragraph P-2 of the General Order makes the applicator
17 responsible for maintaining required signs during water use
18 restriction periods:

19 *The applicator shall ensure that signs remain in place*
20 *until the end of the period of water use restrictions (i.e.,*
21 *restrictions on swimming, fish consumption, domestic and*
irrigation use.) (emphasis added).

22 XIX

23 Because Chapt. 90-48 RCW is a strict liability statute (Spackman
24 v. DOE, PCHB 91-122 (1992); CH20, Inc. v. DOE, PCHB Nos. 84-182, 85-66
25 (1985)), Aquatics cannot pass the responsibility for missing or

26 FINAL FINDINGS OF FACT,
27 CONCLUSIONS OF LAW AND ORDER
SHB NO. 91-40

1 improper signage to recalcitrant neighbors. (Since Aquatics was
2 employed by the lake residents to treat the lake, the Board must
3 wonder why they would have objected to the required signing.)

4 If there were such strenuous objections by the residents,
5 Aquatics failed to act in accordance with par. G-5 of the General
6 Order:

7 *The applicator shall notify the Department of Ecology,*
8 *Water Quality Program ... within 24 hours ... following receipt*
9 *of any citizen complaint regarding issues of public health,*
10 *environmental safety, or any condition in this Administrative*
11 *Order, ...*

12 XX

13 Aquatics claims that it is not liable because RCW 90.48.260
14 designates Ecology as the state agency for all purposes of the federal
15 clean water act, that the ultimate objective of the federal act is the
16 total elimination of the discharge of pollutants into navigable waters
17 (citing various cases), and that Ecology has not proven that Ohop is a
18 navigable lake.

19 90.48 RCW is not limited to Ecology's functions as the federal
20 agent. RCW's 90.48.020/120 and the General Order establish that the
21 jurisdiction of Ecology extends to all surface waters of the state,
22 not just navigable waters.

23 XXI

24 Aquatics claims that, because RCW 90.48.140 provides for criminal
25 penalties, Chapter 90.48 is penal and that, therefore, the violation
26 of notice provisions should be dismissed. This arguments merits no

27 FINAL FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER
SHB NO. 91-40

1 further discussion than to note that the penalty is being imposed
2 under RCW 90.48.144 which provides for civil, not penal, penalties.

3 XXII

4 As stated above, 90.48 RCW is a strict liability statute, and
5 Aquatics analysis of form versus substance is inappropriate in this
6 matter.

7 XXIII

8 Aquatics urges that, under the doctrine of equitable estoppel,
9 Ecology should be estopped from asserting its position in this matter.

10 Aquatics bases this claim on the uncorroborated testimony of Mr.
11 Dorling that Mr. Maynard gave prior approval for Aquatics to proceed
12 with the July 9 herbicide treatment even though he (Maynard) was aware
13 of the sign deficiencies. Mr. Maynard testified that, while he saw
14 Mr. Dorling across the lake, he did not talk with him, come into
15 contact with him, or give approval for the treatment.

16 XXIV

17 In Kramarevsky v. DSHS, 64 Wn.App. 14 (1992), the court presents
18 an analysis of the elements which must be present to assert equitable
19 estoppel against the State. It is not necessary to do a full analysis
20 of all of those elements. We cite the following from page 19 of the
21 opinion:

22 *Because equitable estoppel against the government is*
23 *disfavored, each of the elements must be established by clear,*
24 *cogent and convincing evidence. The burden of proving each of*
the elements is on the party seeking to invoke the doctrine of
equitable estoppel. (cites omitted).

25
26 FINAL FINDINGS OF FACT,
27 CONCLUSIONS OF LAW AND ORDER
SHB NO. 91-40

XXV

One of the elements necessary for equitable estoppel is (1) "an admission, statement, or act, inconsistent with the claim afterwards asserted; ..." Mr. Dorling's uncorroborated testimony that Mr. Maynard gave prior approval to the herbicide treatment on July 9 does not meet the burden of proof required to overcome Mr. Maynard's testimony that he did not speak to Mr. Dorling nor give such approval on that day.

We conclude that Ecology is not estopped from its present position in this matter.

MITIGATION

XXVI

RCW 90.48.144(3) provides that every person who violates an order issued by Ecology pursuant to 90.48 RCW:

... shall incur a penalty in an amount of up to ten thousand dollars a day for every such violation. Each and every violation shall be a separate and distinct offense...(and)...The penalty amount shall be set in consideration of the previous history of the violator and the severity of the violation's impact on public health and/or the environment in addition to other relevant factors.

XXVII

In assessing the penalty imposed, Ecology grouped the violations of General Order paragraphs P-2 and P-3(1) together as one violation while violations of P-3(3) were considered a separate violation. The maximum penalty under law was ten thousand dollars for each violation for a total maximum of twenty thousand dollars.

FINAL FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER
SHB NO. 91-40

XXVIII

In determining the actual amount assessed, Ecology considered:

The potential hazard of endotoxin to public health as determined in Ecology's Endotoxin Risk Assessments study;

Aquatics record of approximately seventeen violations cited by Ecology since 1988, a large number of them for posting violations;

Ecology's Enforcement Manual guidelines which could have resulted in an assessment of \$102,000 except for the statutory \$10,000 maximum per violation per day; and

The hope that mitigation of the allowable \$20,000 penalty by \$2,000 would encourage future cooperation of Aquatics with Ecology.

XXIX

The Board finds no mitigating factors which would convince us that the penalty should be denied, reduced, or partially suspended:

Aquatics experience in herbicide treatment of lakes since 1980 along with the number of its past violations indicates, at a minimum, a disregard for the terms of Ecology's Orders rather than a misunderstanding of their meaning.

If, as Aquatics alleges, its signs were torn down or refused by the residents on July 8 and 9, Aquatics could have postponed its treatment of Ohop Lake from July 9, informed Ecology of its problems, and waited for resolution before performing the

1 treatment. This Aquatics did not do but, instead, with full
2 knowledge that the signing was deficient because of the
3 residents' alleged acts, chose to treat the lake on July 9. (We
4 note that if any liability attaches to the residents of the Lake
5 because of their alleged interference with the signs, such a
6 determination lies outside the jurisdiction of this Board.)

7 Aquatics' uncorroborated contention that the residents
8 refused to allow placement of or destroyed the signs because they
9 would interfere with water activities on the Lake on the 4th of
10 July weekend lacks credibility. July 4, 1990, was on a
11 Wednesday, the following weekend ended on Sunday, the 8th, and
12 the treatment date was the 9th, so the lake obviously was not
13 closed on Sunday.

14 XXX

15 Any Conclusion of Fact deemed to be a Conclusion of Law is hereby
16 adopted as such. From these Conclusions of Law, the Board enters this
17
18
19
20
21
22
23
24
25

26 FINAL FINDINGS OF FACT,
27 CONCLUSIONS OF LAW AND ORDER
SHB NO. 91-40

ORDER

THAT the \$18,000 penalty assessed by Ecology and imposed on Allied Aquatics by Notice and Order of Penalty Incurred DE 90-228 is AFFIRMED.

Dated this 4th day of March, 1993.

POLLUTION CONTROL HEARINGS BOARD


HAROLD S. ZIMMERMAN, Chairman


ROBERT V. JENSEN, Attorney Member


JOHN H. BUCKWALTER, Presiding
Administrative Appeals Judge.

FINAL FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER
SHB NO. 91-40